

E-filed: July 2, 2008

Matthew L. Johnson (6004)  
 Melissa A. Vermillion (10261)  
 Russell G. Gubler (10889)  
 MATTHEW L. JOHNSON & ASSOCIATES, P.C.  
 Lakes Business Park  
 8831 W. Sahara Ave.  
 Las Vegas, NV 89117  
 Phone: (702) 471-0065  
 Fax: (702) 471-0075  
 Email: mjohnson@mjohnsonlaw.com

Attorneys for Creditor,  
 Dolores Leserra

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:	)	Case No.: 07-16645-lbr
CHONG, LISA MARIE,	)	Chapter 7
Debtor.	)	Date of Hearing: August 5, 2008
	)	Time of Hearing: 9:30 a.m.

**MOTION FOR RELIEF FROM THE DISCHARGE INJUNCTION TO ALLOW  
 CREDITOR TO PROCEED AGAINST DEBTOR'S INSURANCE PROCEEDS**

Creditor, DOLORES LESERRA ("Leserra") through her attorneys, MATTHEW L. JOHNSON, MELISSA A. VERMILLION, and RUSSELL G. GUBLER, of the law firm of MATTHEW L. JOHNSON & ASSOCIATES, P.C., respectfully moves this Honorable Court, pursuant to 11 U.S.C. § 524(a) & (e), for relief from the discharge injunction, to the extent that there is an injunction against the Debtor's insurance company, to allow the Eighth Judicial District Court case in *DOLORES LESERRA, vs. SA CHONG*, case no. A522211, to proceed against Debtor, to allow Leserra to collect from the Debtor's insurance provider the value of the claim for any causes of action arising out of the automobile accident that occurred on or about January 8, 2005, between Leserra and the Debtor. Leserra warrants that any judgment awarded, including excess judgment, shall be collected from the Debtor's insurer only, and not against the Debtor personally. Leserra warrants that she will not collect any judgment awarded, including excess judgment, from the Debtor, individually, but shall seek any judgment from the Debtor's insurer.

MATTHEW L. JOHNSON & ASSOCIATES, P.C.  
 LAKES BUSINESS PARK  
 8831 WEST SAHARA  
 LAS VEGAS, NEVADA 89117  
 (702) 471-0065  
 (702) 471-0075

1 This Motion is based on the points and authorities set forth herein, the pleadings and  
 2 papers on file in this matter, and any evidence and argument presented at the time of hearing in  
 3 support of the Motion.

4 DATED this 2nd day of July, 2008.

5 MATTHEW L. JOHNSON & ASSOCIATES, P.C.

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7  
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 10 Russell G. Gubler (10889)  
 11 Lakes Business Park  
 12 8831 West Sahara Avenue  
 13 Las Vegas, Nevada 89117  
 14 (702) 471-0065  
 15 (702) 471-0075 (facsimile)

16 Attorneys for Creditor,  
 17 Dolores Leserra

# POINTS AND AUTHORITIES

## I. FACTS

16 On or about January 8, 2005, Leserra was driving westbound on St. Louis, in Clark  
 17 County, Nevada. Debtor was traveling southbound on Maryland Parkway in Clark County,  
 18 Nevada. Debtor traveled against a red light at the intersection of Maryland Parkway and St.  
 19 Louis and collided with Leserra. The front of Debtor's vehicle struck the rear of Plaintiff's  
 20 vehicle. Because of the collision, Leserra has suffered serious bodily injury and damages in  
 21 excess of \$500,000.

22 On or about May 23, 2006, Leserra filed a complaint concerning the collision and  
 23 named Debtor as the defendant. To settle the matter, Leserra demanded the policy limits from  
 24 Debtor's automobile insurance company. However, Debtor's insurance carrier rejected the  
 25 demand in bad faith. Upon information and belief, Debtor's insurance counsel advised Debtor  
 26 to file bankruptcy. Thereafter, on or about October 15, 2007, Debtor filed a Chapter 7  
 27 Voluntary Petition, and the state court action against Debtor was stayed.  
 28

MATTHEW L. JOHNSON & ASSOCIATES, P.C.  
 LAKES BUSINESS PARK  
 8831 WEST SAHARA  
 LAS VEGAS, NEVADA 89117  
 (702) 471-0065  
 (702) 471-0075

1 Because the action was stayed, Leserra still has a personal injury claim against the  
 2 Debtor stemming from a motor vehicle accident on January 8, 2005. Before Leserra could  
 3 settle or otherwise pursue any claim with Debtor's insurance company, Debtor filed her  
 4 bankruptcy petition. As a result, Leserra has mounting medical expenses stemming from an  
 5 accident that was not her fault.

6 Leserra now requests that this Honorable Court grant her relief from the discharge  
 7 injunction to allow the District Court case to proceed, and so that Leserra's claim may be  
 8 determined. Leserra will not attempt to collect against Debtor personally, but will seek to  
 9 enforce any judgment against the debtor's automobile insurance company.

## 10 II. ARGUMENT

### 11 A. *Leserra requests that this Honorable Court reopen the Debtor's* 12 *bankruptcy proceeding.*

13 The decision to reopen a bankruptcy case lies within the discretion of the bankruptcy  
 14 court. *In the Matter of Gladys E. Shondel*, 950 F.2d 1301, 1304 (7th Cir. 1991); *Hawkins v.*  
 15 *Landmark Finance Co.*, 727 F.2d 324, 326 (4th Cir. 1984); *In re Patterson*, 297 B.R. 110, 114  
 16 (Bankr.E.D.Tenn. 2003). In general, because a bankruptcy court does not have power to  
 17 discharge the liabilities of a nondebtor (*see Underhill v. Royal*, 769 F.2d 1426, 1431-32 (9th  
 18 Cir. 1985)), a discharge injunction does not prevent a creditor from suing a debtor on a  
 19 nondischargeable debt, or from naming the debtor as a nominal defendant in a suit to recover a  
 20 dischargeable debt so long as the judgment will not be enforced against the debtor. *In the*  
 21 *Matter of Gladys E. Shondel*, 950 F.2d 1301, 1306 (7th Cir. 1991); *In re Jones*, 348 B.R. 715,  
 22 719 (Bankr.E.D.Va. 2006). Similarly, a creditor does not violate the discharge injunction by  
 23 proceeding with a postdischarge suit against a debtor to determine the liability to collect from  
 24 a third party, such as an insurance carrier. *In re Patterson*, 297 B.R. 110, 113  
 25 (Bankr.E.D.Tenn. 2003). However, bankruptcy courts have noted:  
 26  
 27  
 28

[A] creditor who proceeds outside the bankruptcy court without first seeking a determination of dischargeability or relief from the discharge injunction runs the risk of being held in contempt for violating of the discharge injunction if the debt is determined to be dischargeable.

*In re Jones*, 348 B.R. at 719; *Cherry v. Arendall (In re Cherry)*, 247 B.R. 176

(Bankr.E.D.Va.2000). Therefore, parties have been “well advised in doubtful cases to seek relief from the discharge injunction in the bankruptcy court prior to commencing suit in another forum.” *In re Jones*, 348 B.R. at 719.

A bankruptcy court has authority to modify a discharge injunction to allow a creditor to proceed with a tort action solely to recover from the debtor’s insurer. *In the Matter of Gladys E. Shondel*, 950 F.2d 1301, 1308 (7th Cir. 1991). “Such modifications are frequently made in order to effectuate provisions of the Bankruptcy Code, such as section 524(e)’s exemption of ‘any other entity’ which may be liable on the debtor’s behalf from the statutory injunction.” *In the Matter of Gladys E. Shondel*, 950 F.2d 1301, 1308 (7th Cir. 1991); see e.g., *Jet Florida*, 883 F.2d at 973; *In re McGraw*, 18 B.R. 140 (Bankr.W.D.Wis. 1982).

For purposes of collecting on a discharged prepetition debt from a debtor’s insurer, a creditor does not need to proceed with a postdischarge lawsuit to determine liability as a prerequisite to filing a motion to reopen a debtor’s closed Chapter 7 bankruptcy case to obtain relief from a discharge injunction. *In re Patterson*, 297 B.R. 110, 114 (Bankr.E.D.Tenn. 2003).

In the matter at hand, Leserra was pursuing her personal injury claim in state court against the Debtor. During the lawsuit against Debtor, Leserra attempted to settle the claim within the Debtor’s insurance policy limits. However, Debtor’s insurance provider refused. Thereafter, Debtor’s insurance defense counsel suggested that Debtor file bankruptcy instead of fighting the claim. Debtor subsequently filed bankruptcy, and Debtor’s bankruptcy petition was granted. Debtor received a discharge on or about January 15, 2008.

MATTHEW L. JOHNSON & ASSOCIATES, P.C.  
LAKES BUSINESS PARK  
8831 WEST SAHARA  
LAS VEGAS, NEVADA 89117  
(702) 471-0065  
(702) 471-0075

MATTHEW L. JOHNSON & ASSOCIATES, P.C.  
 LAKES BUSINESS PARK  
 8831 WEST SAHARA  
 LAS VEGAS, NEVADA 89117  
 (702) 471-0065  
 (702) 471-0075

Leserra desires to pursue her claim in state court. However, to ensure that Leserra does not violate the discharge injunction against the Debtor, Leserra requests that this Honorable Court use its authority to reopen the Debtor's bankruptcy proceeding to grant an order of relief from the discharge injunction, to the extent that there is an injunction against the Debtor's automobile insurance company. As is often the case, such an order would effectuate provisions of the Bankruptcy Code, such as section 524(e)'s exemption of "any other entity", which may be liable on the debtor's behalf from the statutory injunction. Such an "other entity" would be Debtor's automobile insurance provider.

***B. To the extent that there is an injunction against the Debtor's insurance company, Leserra requests that this Honorable Court modify the injunction to allow Leserra to pursue her claims in state court and to collect from the Debtor's insurance provider the value of Leserra's claims.***

Leserra may pursue her claim in state court, without holding the Debtor personally liable. Section 524(a) of the Bankruptcy Code states:

A discharge in a case under this title . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt *as a personal liability of the debtor*, whether or not discharge of such debt is waived.

11 U.S.C. § 524(a)(2) (emphasis added). Similarly, section 524(e) states, that the "discharge of a debt of the debtor *does not affect the liability of any other entity on, or the property of any other entity for, such debt.*" 11 U.S.C. § 524(e) (emphasis added). Therefore, a "discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt. Section 524(e) specifies that the debt still exists and can be collected from any other entity that might be liable." *In re Edgeworth*, 993 F.2d 51, 53 (5th Cir. 1993).

MATTHEW L. JOHNSON & ASSOCIATES, P.C.  
 LAKES BUSINESS PARK  
 8831 WEST SAHARA  
 LAS VEGAS, NEVADA 89117  
 (702) 471-0065  
 (702) 471-0075

1 Leserra may pursue the Debtor in name to obtain a judgment against Debtor's insurance  
 2 provider. When the costs of defense are paid by the insurer and there is no execution of  
 3 judgment against the debtor personally, the Code does not bar suit against a discharged debtor  
 4 as nominal defendant, even if insurer denies coverage. *In re Edgeworth*, 993 F.2d 51, 54 (5th  
 5 Cir. 1993); *see also In re Jet Florida Sys., Inc.*, 883 F.2d 970, 976 (11th Cir. 1989); *In the*  
 6 *Matter of Gladys E. Shondel*, 950 F.2d 1301, 1308 (7th Cir. 1991). Therefore, a creditor may  
 7 proceed with an post-discharge action against a debtor, in name only, in order to establish the  
 8 liability and possibly collect from an insurance carrier. *In re Patterson*, 297 B.R. 110, 113  
 9 (Bankr.E.D.Tenn. 2003). If an insurer is unwilling to defend its insured, the debtor may simply  
 10 default, knowing that judgment will be unenforceable except against the insurer. *In re*  
 11 *Edgeworth*, 993 F.2d 51, 54 (5th Cir. 1993).

12 The Debtor's insurance provider may still be liable because the Code only protects *the*  
 13 *Debtor* from personal liability. At the time of the accident between Leserra and the Debtor, the  
 14 Debtor carried insurance. Although the Debtor was discharged from liability, Leserra still has  
 15 uncompensated medical bills from the accident. By granting an order of relief that would allow  
 16 Leserra to pursue her claims in state court, Debtor will not be affected, and Leserra will still be  
 17 able to seek compensation under her claim. Even if Debtor is nominally named, Leserra would  
 18 not hold the debtor personally liable. Instead, Leserra would only pursue a judgment for the  
 19 value of her claim against the Debtor's automobile insurance carrier. As expressed above, such  
 20 grants of relief are generally granted against an insurance carrier because the relief will not  
 21 affect the Debtor or the property of the Estate. Therefore, Leserra requests that this Honorable  
 22 Court, to the extent that there is an injunction against the Debtor's automobile insurance  
 23 company, grant relief from the discharge injunction in this matter, as provided in the Code.

1 **III. CONCLUSION**

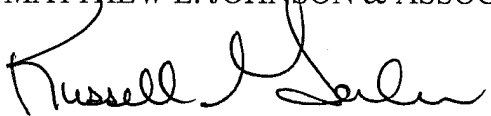
2 The Court has discretion to reopen a bankruptcy case to grant relief from the discharge  
3 injunction. Such actions by a bankruptcy court are common to allow one who holds a claim in  
4 state court to proceed against the Debtor's insurance carrier. To the extent that there is an  
5 injunction against the Debtor's insurance company, Leserra requests that this Honorable Court  
6 grant relief from the discharge injunction to allow Leserra to pursue the Eighth Judicial District  
7 Court case in *DOLORES LESERRA, vs. SA CHONG*, case no. A52221, and to allow Leserra to  
8 collect from the Debtor's insurance provider the value of the claim for any causes of action  
9 arising out of the automobile accident that occurred on or about January 8, 2005, between  
10 Leserra and the Debtor.

11 Leserra warrants that she will not attempt to collect against the Debtor individually, but  
12 will seek proceeds from Debtor's automobile insurance carrier. For these reasons, relief from  
13 the discharge injunction should be granted.

14 DATED this 2<sup>nd</sup> day of July, 2008.

15 MATTHEW L. JOHNSON & ASSOCIATES, P.C.

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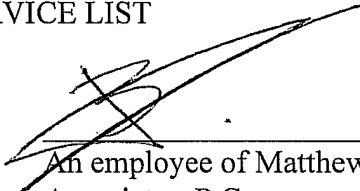
  
Matthew L. Johnson (6004)  
8831 W. Sahara Avenue  
Las Vegas, Nevada 89117  
(702) 471-0065  
(702) 471-0075 (facsimile)

Attorneys for Creditor,  
Dolores Leserra

**CERTIFICATE OF SERVICE**

I hear by certify that on this 7<sup>th</sup> day of July, 2008, I sent a true and correct copy of the foregoing MOTION FOR RELIEF FROM THE DISCHARGE INJUNCTION TO ALLOW CREDITOR TO PROCEED AGAINST DEBTOR'S INSURANCE PROCEEDS via electronic service to the following:

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An employee of Matthew L. Johnson & Associates, P.C.

MATTHEW L. JOHNSON & ASSOCIATES, P.C.  
LAKES BUSINESS PARK  
8831 WEST SAHARA  
LAS VEGAS, NEVADA 89117  
(702) 471-0065  
(702) 471-0075



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BELCREST COMMUNITY ASSOC.  
C/O ASSOC. COMMUNITY MANAGEMENT  
PO BOX 94077  
LAS VEGAS, NV 89193-4077

HOMEcomings FINANCIAL  
PO BOX 205  
WATERLOO, IA 50704-0205

NEVADA DEPT OF TAXATION  
REVENUE DIVISION CAPITAL COMPLEX  
101 N CARSON ST STE 3  
CARSON CITY, NV 89701-3714

ROBERT VANNAH, ESQ.  
ROBERT M. CRAM, ESQ.  
400 S 4TH ST 6TH FL  
LAS VEGAS, NV 89101-6201

U.S. TRUSTEE - LV - 7  
300 LAS VEGAS BOULEVARD, SO.  
SUITE 4300  
LAS VEGAS, NV 89101-5803

WILLIAM W. MCGAHA  
DELANOY, SCHUETZE & Mc GAHA  
601 S Rancho Dr Ste C20  
Las Vegas, NV 89106-4825

LENARD E. SCHWARTZER  
2850 S. JONES BLVD., #1  
LAS VEGAS, NV 89146-5640

(p)FRANKLIN CREDIT MANAGEMENT CORP  
101 HUDSON STREET  
25TH FLOOR  
JERSEY CITY NJ 07302-3984

United States Bankruptcy Court  
300 Las Vegas Blvd., South  
Las Vegas, NV 89101-5833

DEPT OF MOTOR VEHICLES & PUBLIC SAFETY  
RECORDS SECTION  
555 WRIGHT WAY  
CARSON CITY, NV 89711-0001

(p)INTERNAL REVENUE SERVICE  
CENTRALIZED INSOLVENCY OPERATIONS  
PO BOX 21126  
PHILADELPHIA PA 19114-0326

OFFICE OF U.S. TRUSTEE  
600 LAS VEGAS BLVD S STE 430  
LAS VEGAS, NV 89101-6637

RONALD SMITH, CHIEF  
IRS SPECIAL PROCEDURES  
4750 W OAKY BLVD  
LAS VEGAS, NV 89102-1535

WELLS FARGO  
PO BOX 30086  
LAS VEGAS, NV 89173-0086

Wells Fargo Bank, N.A.  
c/o Wells Fargo Card Services  
Recovery Department  
P.O. Box 9210  
Des Moines, IA 50306-9210

LISA MARIE CHONG  
1515 ANGEL FALLS ST.  
LAS VEGAS, NV 89142-1287

HOMEcomings FINANCIAL, LLC  
c/o Pite Duncan, LLP  
525 East Main Street  
P.O. Box 12289  
El Cajon, CA 92022-2289

ABRAMS & TANKO, LLLP  
MICHELLE L. ABRAMS  
3085 S. Jones Blvd., Suite C  
Las Vegas, NV 89146-6767

FRANKLIN CREDIT  
101 HUDSON ST 25TH FL  
JERSEY CITY, NJ 07302-3984

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, IN  
PITE, DUNCAN, LLP  
525 E. MAIN STREET  
P.O. BOX 12289  
EL CAJON, CA 92022-2289

PITE DUNCAN, LLP  
STEVEN W. PITE  
EDDIE R. JIMENEZ  
525 E. Main Street  
P.O. Box 12289  
El Cajon, CA 92022-2289

TARGET  
PO BOX 59317  
MINNEAPOLIS, MN 55459-0317

WELLS FARGO  
PO BOX 5169  
SIOUX FALLS, SD 57117-5169

DAVID J. WINTERTON  
211 N. BUFFALO DR. #A  
LAS VEGAS, NV 89145-0302

FRANKLIN CREDIT MANAGEMENT CORPORATION  
P.O. Box 2301  
Jersey City, NJ 07303-2301

INTERNAL REVENUE SERVICE  
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